Supreme Court, U.S.
FILED
APR 21 1993
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No. 92-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of noncitizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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Appellants,

v.

MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF OF APPELLANTS

Speaker Bolley Johnson,[1] Representative Peter Wallace, Governor Lawton Chiles, Attorney General Robert Butterworth and Secretary of State Jim Smith, in their official capacities, appeal the judgment of the three-judge United States District Court for the Northern District of Florida, which held that the 1992 reapportionment plan for the Florida Legislature violates Section 2 of the Voting Rights Act.

OPINIONS BELOW

The July 17, 1992 opinion of the three-judge United States District Court for the Northern District of Florida in Nos. 92-40015-WS, 92-40131-WS, and 92-40220-WS

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[1] Bolley Johnson has replaced T.K. Wetherell as Speaker of the Florida House of Representatives. His name has been substituted pursuant to S. Ct. Rule 35.3. In addition to the parties listed in the caption, Gwen Margolis and Jack Gordon were parties to the proceeding below. *See* S. Ct. Rule 24.1(b).

("Op."), holding that Senate Joint Resolution 2-G violates Section 2 of the Voting Rights Act, has not yet been reported, and appears in the appendix to the jurisdictional statement ("J.S. App.") at 7a. The May 29, 1992 opinion of the three-judge court in Nos. 92-40015-WS and 92-40131-WS, reapportioning districts for the United States Congress, is reported at 794 F. Supp. 1076, and appears at J.S. App. 77a.

JURISDICTION

The judgment that Senate Joint Resolution 2-G violates the Voting Rights Act was entered on July 2, 1992. Appellants Wetherell and Wallace filed a notice of appeal to this Court on July 24, 1992. Appellants Chiles, Butterworth, and Smith filed a notice of appeal to this Court on July 29, 1992. The appeal was docketed within 60 days of July 24, 1992. Probable jurisdiction was noted on February 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

See J.S. App. 211a.

STATEMENT OF THE CASE

On April 10, 1992, the State of Florida enacted Senate Joint Resolution 2-G ("the State Plan"), which reapportioned the Florida Senate and House of Representatives on the basis of the 1990 census results. The State Plan creates 20 single-member House districts in the Dade County area. The plan affords Hispanics, who comprise approximately 45% of the population of that 20-district area, the opportunity to elect their preferred candidates in at least 9 of the 20 districts (or 45%).

Nevertheless, on July 2, 1992, a three-judge United States District Court issued an unprecedented ruling that the State Plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it failed to *maximize* the number of Hispanic House districts in the Dade

County area.[2] This Court stayed the district court's judgment, and the State Plan was implemented for the 1992 elections. Hispanic candidates were elected in 9 of the 20 districts.[3]

Appellants seek reversal of the district court's ruling because it fundamentally misconceives Section 2 of the Voting Rights Act. Section 2 does not guarantee maximum electoral opportunity. Section 2 provides that a protected class should not be afforded "*less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(c) (emphasis added). Based on the district court's findings that the plan permits Hispanic voters to elect preferred candidates in 9 of the 20 districts, the State Plan plainly does not afford Hispanics in the Dade County area "less opportunity than other members of the electorate."

A. Reapportionment After the 1990 Census

1. The Reapportionment Process

Article III, § 16 of the Florida Constitution requires that Florida's bicameral legislature be reapportioned every ten years on the basis of the decennial census.[4] According

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[2] The portion of the State Plan that reapportioned the Florida House of Representatives is at issue in this appeal, No. 92-519. The portion of the State Plan that reapportioned the Florida Senate is at issue in No. 92-593 and No. 92-767. The district court held that the Senate part of the plan violated Section 2 because it failed to maximize the number of both Hispanic and African American Senate districts in Dade County, but that no remedy was appropriate because maximizing one group's representation would inevitably impair the represention of the other group.

[3] *See Elections 1992; State of Florida Official Primary Election Returns; Sept. 1, 1992, Sept. 8, 1992, Oct. 1, 1992*, Fla. Dept. of State, Div. of Elections; *Elections 1992; State of Florida Official General Election Returns; Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections.

[4] Section 16 provides for a maximum of 40 state senate districts and 120 state house districts, and permits either a single-member

to the 1990 census, Florida's population grew in the 1980's by 3,213,602, to 12,937,926 (or 33%). Op., J.S. App. 9a. This explosive growth reshaped the ethnic and political makeup and geographic distribution of Florida's population. The population growth of Hispanics, including substantial immigration of Hispanics from Cuba and Central and South America, accounts for approximately 700,000 of the 3.2 million increase. Reapportionment thus required a substantial reconfiguration of the State's legislative districts.

Following the 1990 census, the Florida legislature established bipartisan House and Senate committees to propose a plan for reapportionment. The committees took steps to open the process to all interests and perspectives. Members of the Florida Caucus of Black State Legislators served on the committees and played an active role throughout the redistricting process.[5] Members of the Hispanic Caucus, including Representatives Miguel De Grandy and Mario Diaz-Balart, the principal private plaintiffs in this case, also served on the committees and played

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or a multi-member district configuration. *See* Florida Const. Art. III, § 16(a). Prior to 1972, Florida used a county-based plan of apportionment that combined multi-member districts and single-member districts. *See In re Apportionment Law SJR 1305*, 263 So. 2d 797, 801 (Fla. 1972). Though permitted by Art. III, Section 16, that approach was abandoned in 1982 and replaced with a single-member district plan for all districts within the State. Florida chose single-member districts to reduce the risk that the voting strength of its minority populations would be unfairly reduced as a result of the tendency of multimember districts to submerge minority voting strength. *See generally In re Apportionment Law SJR 1E*, 414 So. 2d 1040, 1042-1045 (Fla. 1982).

[5] Testimony of Representative Willie Logan (caucus chairman), VII Trial Transcript ("Tr.") 73-77. The role of the Black Caucus, and of Florida's African-American organizations, including the NAACP, is described more fully in the brief *amicus curiae* of Florida State Representatives Cynthia Chestnut, Douglas Jamerson, Alfred Lawson, Willie Logan and Alzo Reddick, submitted in this case at the jurisdictional stage. Appellants respectfully refer the Court to that brief for a fuller description of the process.

an active role.[6] Representatives De Grandy and Diaz-Balart introduced proposed reapportionment legislation in the Florida House.[7] Indeed, more than 150 groups, including the Florida Chapter of the NAACP,[8] participated in the process.[9] Thirty-four public hearings were held throughout the State, from Pensacola to Key West, to permit citizens and groups to contribute their views. The State Plan was the product of this process.

2. The Reapportionment of Dade County

The Dade County area comprises substantial Hispanic, African-American and Anglo (non-Hispanic White) populations in a densely populated urban environment. Hispanics make up approximately 45% of the voting age population of the 20-district Dade County area.[10] As

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[6] Testimony of Representative Miguel De Grandy, IV Tr. 21, 42-45, 50.

[7] *See* Logan Testimony, VII Tr. 79; De Grandy Testimony, IV Tr. 20-42.

[8] Testimony of Leon Russell (Vice President State Conference of the NAACP), III Tr. 107-08, J.A. 425-26, and VII Tr. 139 (expressing NAACP support for Dade County House redistricting in the State Plan, and noting NAACP participation in its drafting and implementation).

[9] *See* Def. Cong. Exh. 4, Joint Appendix ("J.A.") 227 (listing groups, including the Cuban American Bar Association, the Coalition of Hispanic American Women, the Spanish American League Against Discrimination, the Nicaraguan American Bankers and Businessman's Association, the Hispanic American Builders Association, the Concerned Puerto Rican Alliance, the Latin American Chamber of Commerce, and the Nicaraguan Medical Association).

[10] The population of Dade County proper is 1,937,094. The ideal House district is 107,816. Thus, 17.94 districts can be contained within Dade County. Technically, 17 districts in the State Plan are wholly within the County. Eighty-one percent of the residents of an eighteenth district reside in Dade County. *See* Testimony of George Meier, VI Tr. 203, 210. For the 18 districts, the voting age popula-

the district court found, the State Plan affords Hispanics the opportunity to elect their preferred candidates in at least 9 of the 20 House districts (or 45%). *See* Op., J.S. App. 67a. African-Americans, who make up slightly less than 20% of this 20-district area, will be able to elect preferred candidates in at least 4 of the districts (or 20%). *Id.*, J.S. App. 67a. The remaining 7 districts contain Anglo voting age majorities, but one includes a substantial African-American population and is currently represented in the House by an African-American.[11] Another contains a Hispanic voting age population of at least 46%,[12] and its incumbent, a bilingual Anglo Dem-

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tion and numbers of majority House districts for each group is as follows:

Population		Number of House Districts
Hispanic	50.4%	9 (50%)
African-American	16.0%	4 (22%)
Anglo	32.1%	5 (28%)

See Plaintiff's Exh. 5 (Report Accompanying SJR 2-G) (Data for Districts 102-119), J.S. App. 171a, 180a-182a.

However, in this litigation, the plaintiffs contended that the relevant frame of reference for evaluating alleged Hispanic vote dilution was a somewhat larger 20-district "Dade County area." *See* Complaint of the United States at ¶ 4, J.A. 75, and the district court analyzed the allegations within this frame of reference. Only 2 percent of the residents of one of the additional districts, and only 28 percent of the residents of the second additional district, reside in Dade County. For the 20 district area, the voting age population and number of majority House districts for each group is as follows:

Population		Number of House Districts
Hispanic	46.6%	9 (45%)
African-American	15.6%	4 (20%)
Anglo	36.4%	7 (35%)

See Plaintiffs' Exh. 5 (Data for Districts 101-120), J.S. App. 171a, 180a-182a. Thus, the issues on appeal are not materially affected by which frame of reference is chosen.

[11] Wallace Testimony, VII Tr. 164; Logan Testimony, III Tr. 164, J.A. 386.

[12] De Grandy Testimony, IV Tr. 51.

ocrat, receives substantial Hispanic support.[13] If the Hispanic population increases, this district could well become a Hispanic majority district.

At bottom, the State Plan creates the opportunity for Hispanics and African-Americans in the Dade County area to achieve levels of electoral success commensurate with their population percentages. The State Plan does not seek to *maximize* the electoral prospects of any particular population in Dade County; maximization of one group's opportunity would necessarily require diminution of another's. Rather, to the extent Dade County's Hispanic, African-American and Anglo communities have distinct and incompatible political interests, the State Plan affords each community an equal opportunity to elect candidates of choice.

That the legislature was able to achieve this result is little short of remarkable. The drafters of the State Plan had to reconfigure the political landscape of the Dade County area in response to what one of plaintiffs' experts described as "the single most dramatic ethnic transformation of any major American city in this century."[14] Dade County's overall population grew by 19 percent during the 1980's, but its Hispanic population increased by more than 350,000 persons (or 64%), principally as a result of immigration from Cuba, Nicaragua, Columbia, Peru and other Latin American nations. These immigrants chose Dade County, according to plaintiffs' expert, because "Latin Americans felt they could come here without suffering the kind of language barriers and discrimination that they would suffer in other large U.S. cities."[15] Whereas in 1980, Anglos made up 47% of Dade County residents and Hispanics 36%, by 1990 those percentages had essentially reversed. His-

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[13] Ex. 47 (EDS, Inc. Report on Racial Bloc Voting) at 8, J.A. 34; De Grandy Testimony, IV Tr. 52.

[14] Affidavit of Dario Moreno at ¶ 6 (June 23, 1992), J.A. 170.

[15] Testimony of Dario Moreno, II Tr. 14, J.S. App. 185a.

panics now constitute the majority of the voting age population of Dade County proper, and a plurality of the 20-district Dade County area.[16]

The reapportionment plan also had to account for the exceedingly complex structure of Dade County politics. Dade County's dominant Cuban-American population (which constitutes a substantial majority of the Dade County Hispanic population),[17] is extremely conservative—"in stark contrast to that of other Latinos across the U.S.," as plaintiffs' expert put it.[18] Dade County's other principal populations, Anglos and African-Americans, are substantially more liberal, and heavily favor Democratic candidates.[19] At times, Democratic Anglos and African-Americans forge alliances to defeat Republican Hispanic candidates, and elect both Anglo and African-American Democratic candidates. In other instances, Republican Anglos and Cuban-Americans unite to defeat Anglo or African-American Democratic candidates. Cuban-Americans and African-Americans have not, however, forged political alliances in Dade County to defeat Anglo candidates. All experts in this case agreed that the political and ethnic antipathies between Cuban-Americans and African-Americans in Dade County are extreme.[20] Other Hispanic subgroups in the Dade County area have, however, allied themselves with African Americans.[21] Thus, the way in which these ethnic

[16] Meier Testimony, VI Tr. 226-27. The population shift since 1960 is even more stunning. According to the 1960 census, Anglos constituted 79.6% and Hispanics 5.5% of the Dade County population

[17] Op., J.S. App. 44a.

[18] Moreno Affidavit at ¶ 26, J.A. 182.

[19] According to plaintiffs' expert, "Dade County's white voters are among the most liberal in Florida." Moreno Affidavit at ¶ 32, J.A. 185.

[20] *E.g.*, Affidavit of Allan J. Lichtman at ¶¶ 6-8 (June 27, 1992), J.A. 202-203. The district court so found. Op., J.S. App. 45a-53a.

[21] *See* Logan Testimony, III Tr. 147 (Mexican-Americans vote to support African-American candidates in Dade County), J.A. 383.

populations and subpopulations are combined within single-member districts dramatically affects who will be able to elect representatives of choice in particular districts.

B. Legal Challenges to the State Plan

Litigation over the reapportionment of Florida commenced in January 1992, months before the legislature had even adopted the State Plan. On January 14th—the opening day of the 1992 legislative session in which Art. III, § 16(a) of the Florida Constitution required reapportionment to be considered—Representative Miguel De Grandy and several other Cuban-American officeholders and state Republican leaders filed an action in federal court in the Northern District of Florida.[22] They alleged that Florida's *pre-existing* 1982 apportionment plan violated constitutional one-person one-vote requirements, and demanded an immediate federal court order redistricting the State. The district court refused to act on the complaint because the Florida legislature had not yet had the opportunity to enact a new reapportionment plan.

1. Proceedings in the Florida Supreme Court

After the legislature enacted the State Plan on April 10, 1992, the State submitted the plan to the Florida Supreme Court for review, as required by Art. III, § 16 of the Florida Constitution. Voting Rights Act challenges to the State Plan were *first* raised in these Florida Supreme Court proceedings. Representative De Grandy and the other private plaintiffs in the instant federal case ("the De Grandy plaintiffs") participated in that proceeding. They contended that, under Art. III, § 16, the Florida Supreme Court "cannot fulfill its duty . . . unless it first finds that the plan meets the standards of the Voting Rights Act," and that the court "must, in actuality, con-

[22] *See* Motion to Dismiss First Amended Complaint at 13 nn.8 & 9, R. 32.

duct . . . a Section 2 . . . analysis."[23] The De Grandy plaintiffs made substantial evidentiary submissions to support their claim that the State Plan violated Section 2.[24]

In its May 13, 1992 opinion, the Florida Supreme Court asserted jurisdiction over the Section 2 claims. The court found that the State Plan "does not discriminate against minorities," and "is a material improvement over conditions under the 1982 plan"—which had resulted in 7 Hispanic-controlled districts in the Dade County area. *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992), J.S. App. 104a. The court then held that the State Plan "is not significantly less favorable to minorities than other proposed plans, and provides *a substantial opportunity for minorities to influence elections and elect representatives of their choice.*" *Id.* (emphasis added)

The Florida Supreme Court issued this ruling without prejudice to further consideration. In its May 13th order, the court specifically invited interested parties to submit additional evidence to support their Voting Rights Act challenges, and provided for "expedited disposition" after a full evidentiary hearing. *Id.* at 285-86, J.S. App. 120a. No party availed itself of this opportunity.[25]

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[23] *See* Brief of Miguel De Grandy, Et Al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S. Ct. No. 79,674) at 9, J.S. App. 168a; *id.* at 15, J.S. App. 169a-170a.

[24] *See In re Senate Joint Resolution 2G, Special Reapportionment Session 1992*, 597 So. 2d 276, 284 (Fla. 1992) (discussing evidentiary submissions), J.S. App. 117a-119a.

[25] Because in the 1960s bilingual ballots were not available in five Florida Counties containing Hispanic populations, these five counties —not including Dade, which had bilingual ballots—are subject to the preclearance requirements of Section 5 of the Voting Rights Act. *See* Op., J.S. App. 13a-14a. Accordingly, the State Plan was submitted to the U.S. Department of Justice for preclearance on April 17, 1992. On June 16, 1992, the Department precleared the State Plan's reapportionment of the House of Representatives. Thus, for Section 5 purposes, the Department found no Hispanic vote dilution in the five covered counties. The Department objected to the drawing of one district in the State Plan's reapportionment of the Senate. That district was in the Tampa area, and is not at issue in this appeal. Both the Florida Supreme Court and the court below issued orders implementing an identical "remedy" for the Section 5 Senate deficiency identified by the Department.

2. Initial Section 2 Proceedings in Federal Court

Instead, the De Grandy plaintiffs sought to change forums and to litigate identical Section 2 claims against the State Plan in federal court. They did so by seeking to amend the complaint they had previously filed in federal court which had raised challenges only to Florida's *1982* legislative districts. Defendants moved to dismiss all Section 2 claims on the grounds of abstention, comity and *res judicata*, in light of the Florida Supreme Court's May 13th ruling. J.S. App. 210a.

On June 22, 1992, the federal district court granted the De Grandy plaintiffs leave to amend, and denied defendants' motion to dismiss. *See* Order, R.460. The next day, the United States filed a complaint alleging violations of Section 2 similar to those the De Grandy plaintiffs had previously raised.[26] The United States moved for a preliminary injunction on June 25, 1992.

The next morning, June 26th, the district court denied the preliminary injunction motion, consolidated the United States' challenge with the private challenge, and ordered trial to commence immediately that same day on all pending complaints. Defendants were afforded no opportunity to answer the United States' complaint, to take discovery to ascertain the factual basis for plaintiffs' allegations, to depose plaintiffs' experts on their theories as to why

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[26] The United States had been aware of litigation challenging the State Plan for several months. Indeed, defendants filed a third-party complaint against the United States in this action, and the United States moved to dismiss that claim on May 10, 1992. Op., J.S. App. 13a. Furthermore, the State Plan had been submitted to the Justice Department for preclearance on April 17, 1992. Op., J.S. App. 12a.

vote dilution existed in Dade County, to seek summary judgment, or to prepare a complete trial defense.

3. The Federal Court Trial

a. *The liability phase.* The De Grandy plaintiffs' June 18th third amended complaint alleged Voting Rights Act violations in several Florida counties against both the Senate and House portions of the State Plan. The United States similarly alleged violations "in Dade County and elsewhere." [27] Both complaints alleged Hispanic vote dilution in Dade County. With respect to the Florida House, the United States alleged Hispanic vote dilution within a 20-district Dade County area, claiming that Florida should have created two more Hispanic districts in that area than were created by the State Plan. The De Grandy plaintiffs similarly alleged that the Dade County Hispanic population was fragmented to prevent the creation of 2 additional Hispanic districts. *See* De Grandy Third Amended Complaint, County VIII, ¶ 142, J.A. 71. Both the United States and the De Grandy plaintiffs also alleged African American vote dilution in Escambia County (Pensacola), which is several hundred miles northwest of Dade County.

In opening statements at trial, the United States explicitly represented that its case would be "limited to the specific areas . . . just mentioned, [] Dade and Escambia Count[ies]." I Tr. 52.[28] The De Grandy plaintiffs initially alleged vote dilution in other areas of the State including Alachua County, I Tr. 65, Pinellas and Manatee Counties, I Tr. 103, Polk and Hillsborough Counties, and Volusia County, I Tr. 104. However, the trial evidence submitted by all plaintiffs focused exclusively on

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[27] Complaint of the United States at ¶ 8, J.A. 75.

[28] Counsel repeated this representation at several points in opening statement. I Tr. 52 ("Dade-Senate, Dade-House, Escambia-House only"); I Tr. 53 ("what we are really claiming here . . . is that the State of Florida minimized minority voting strength in the Dade County area"). The claim respecting Escambia County involved alleged African-American vote dilution. That issue is no longer a part of this case.

Dade County.[29] Hence, several days into trial, plaintiffs moved to dismiss all claims of Hispanic vote dilution outside Dade County, and the motion was granted.[30]

With respect to the Dade County area, plaintiffs attempted to show that voting was racially polarized, that Dade County Hispanic voters were politically cohesive, and that 11 Hispanic House districts (instead of the State Plan's 9) could have been created. Plaintiffs argued that the legislature's failure to enact alternative plans proposed by plaintiff De Grandy and plaintiff Reaves, which would have created the additional Hispanic districts, violated Section 2. These alternative plans, according to the testimony of plaintiff Reaves, were designed "to *maximize* the majority-minority districts possible" in Dade County.[31]

The State of Florida raised three principal defenses. *First,* defendants argued that the State Plan provided equal electoral opportunity and thus could not violate Section 2. Defendants supported this argument with undisputed facts showing that Hispanics in the Dade County area would have the opportunity to elect representatives

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[29] Plaintiffs' expert, Dr. Allan Lichtman, testified that he had been asked to examine issues of racial bloc voting and political cohesion "for Dade County." Lichtman Affidavit at ¶ 2, J.A. 201; Testimony of Allan Lichtman, III Tr. 12, J.A. 357. Another of plaintiffs' experts, Dr. Dario Moreno, gave testimony about racially polarized voting in Dade County. Moreno Affidavit, J.A. 170.

[30] III Tr. 8 (motion of counsel); III Tr. 214 (oral ruling granting motion). *See also* Op. at n.13, J.S. App. 21a.

[31] Testimony of Daryl Reaves, II Tr. 179 (emphasis added); *see also id.*, II Tr. 184 ("you must create the maximum number of Hispanic districts in Dade County"); IV Tr. 104.

Plaintiffs introduced two alternative plans during the liability phase of the proceedings. One was sponsored by plaintiff De Grandy, a Cuban-American Member of the House. Another was sponsored by plaintiff Reaves, an African-American member of the House. With respect to Dade County, "the Reaves-Brown plan and the De Grandy plan are virtually identical". De Grandy Testimony, IV Tr. 29.

in numbers proportionate to their population levels. *Second*, the State argued that Section 2 does not require maximization of minority districts. *Third*, the State argued that plaintiffs failed to prove the first *Gingles* precondition—that additional districts could be drawn in which Hispanics would constitute a majority of eligible voters—because plaintiffs' proof failed to account for non-citizens who are ineligible to vote. Defendants' unrebutted expert testimony showed that approximately 55% of the Dade County Hispanic voting age population were not citizens, and that 8 of the 11 Hispanic districts in plaintiffs' alternative plans would not contain Hispanic voting age majorities once this citizenship factor was taken into account.[32]

On the evening of July 1, 1992—only 5 days after the trial had commenced—the court heard closing arguments, and then immediately ruled from the bench. With respect to the Senate, the court ruled that no Section 2 violation had been proven because the number of Hispanic districts could not be increased without having a "retrogressive effect" on the African-American population. J.S. App. 202a-203a. With respect to the House, the court ruled that:

> under the totality of the circumstances the plaintiffs have shown a violation of Section 2 *in that the plaintiffs have shown that more than nine Hispanic districts may be drawn* without having or creating a regressive effect upon black voters in South Florida and in Dade County.

VIII Tr. 82 (emphasis added), J.S. App. 203a.

b. *The remedial proceedings.* The remedial proceedings commenced at approximately 7 p.m. on July 1st—

[32] Testimony of William DeGrove (expert demographer), VII Tr. 23-24, J.S. App. 187a; Defendants' Joint Exhibit 2, J.S. App. 206a. *See also* Op. at 33-34, J.S. App. 38a. During trial, the district court repeatedly ruled "as a matter of law that the relevant inquiry in this case is voting age population." V Tr. 40, J.A. 453; *see also* V Tr. 44 (same), J.A. 454; V Tr. 47 (court's ruling "means that citizenship is not important"), J.A. 455.

one hour after the liability judgment was entered. As the proceeding began, the De Grandy plaintiffs introduced a new proposed remedial plan "just hot off the press here about thirty minutes ago." VIII Tr. 96-97 (statement of plaintiffs' counsel). That plan—which the court referred to as the "modified De Grandy plan"—had never been produced to defendants or the court. The United States had not previously seen, and did not endorse, the plan. VIII Tr. 96. Although the district court had found fragmentation of Hispanic populations in only two districts in Dade County, the modified De Grandy plan radically reshaped the boundaries of *thirty-one* districts in the southern part of the State.[33]

The district court heard brief argument on the relative merits of the remedial plans before it, but refused to permit evidentiary submissions.[34] Plaintiff De Grandy—a previously sworn witness—argued from the podium that the modified De Grandy plan protected Hispanic voting opportunity better than did other remedial options, without substantial impairment of the state policies advanced in the State Plan. Those factual assertions were unsworn and not subject to cross-examination.

Less than three hours after the remedial hearing began, the court abruptly halted the proceedings and ordered implementation of the modified De Grandy plan. The court refused pleas from defendants, the NAACP, and *amici* representing Jewish voters to adjourn the proceeding to permit scrutiny of the modified De Grandy plan and consideration of other remedial options.[35]

[33] Maps of the State Plan and the Modified De Grandy plan have been lodged with the Clerk.

[34] VIII Tr. 98 ("We do not intend to hear any more evidence regarding plans"). Appellants objected to the remedial proceedings because they failed to provide any meaningful opportunity for adjudication of the extent to which the modified De Grandy plan unnecessarily infringed upon state policies. J.S. App. 203a.

[35] VIII Tr. 104. The House defendants subsequently filed a motion for reconsideration that proffered some of the evidence they

On July 2, 1992, the court entered separate judgments with respect to the Senate and House portions of the State Plan. In the Senate judgment, the court ordered the implementation of the Senate portion of the State Plan. J.S. App. 3a. In the House judgment, the court held that the State Plan violated Section 2 by diluting Hispanic voting strength, and ordered implementation of the modified De Grandy plan as a permanent remedy for all House elections through the year 2000. J.S. App. 1a.

C. Stay Proceedings in this Court

On July 10, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 2, 1992 order. Justice Kennedy referred the application to the full Court. On July 16, 1992, a unanimous Court granted the stay. *See* Stay Order in No. A-32, J.S. App. 139a. Notwithstanding this Court's stay order, on the evening of July 16, 1992, the district court issued an order requiring that candidate qualification for the 1992 Florida legislative elections be carried out in accordance with the modified De Grandy plan. On the morning of July 17, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 16, 1992 order. That application was referred to the full court, and was unanimously granted on the evening of July 17, 1992. *See* Stay Order in No. A-51, J.S. App. 140a.

D. The Three-Judge District Court's Opinion

On July 17, 1992, the three-judge court issued an opinion that "memorializes and explains the court's rationale for its July 2, 1992 rulings." J.S. App. 24a. Purporting to rely on *Thornburg v. Gingles*, 478 U.S. 30

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would have presented, had they been given the opportunity, demonstrating partisan bias, unnecessary district reconfiguration and other flaws in the remedy adopted by the court. *See* Motion for Reconsideration and Affidavits of George Meier and Kimball Brace attached thereto (July 2, 1992), J.S. App. 145a. The motion was denied.

(1986), the court held that the House portions of the State Plan violated Section 2. The court did not address defendants' argument that the State Plan provided Dade County Hispanic voters electoral opportunity at least equal to the opportunity afforded other members of the Dade County electorate. Indeed, the court appeared to find it irrelevant that the State Plan had no discriminatory effect on Dade County Hispanics. As Judge Vinson's concurring opinion explained:

> the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established *all requisites* of their Section 2 claims.

J.S. App. 74a (emphasis added).[36]

The court's July 17th opinion appeared to contradict the court's July 2d judgment that the Senate portion of the State Plan did not violate Section 2. The opinion asserted that the Senate reapportionment had in fact violated Section 2. The court "explained" that the failure to create an additional Hispanic district violated Section 2 under *Gingles*. The court also held that the failure to create an additional African American Senate district violated Section 2. The court went on to conclude, however, that creating the additional Hispanic district would adversely

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[36] Notwithstanding the court's repeated rulings at trial that evidence of citizenship was irrelevant, the court's subsequent opinion addressed the "citizenship" issue. The court held that, because all 11 Hispanic districts in plaintiffs' proposed alternative plan "satisf[y] the 65% rule, the court need not inquire further as to the Hispanic citizenship levels in each proposed district." Op. at 37, J.S. App. 40a. The "65% rule" relied on by the court is a rule of thumb used by courts in Section 2 *remedial proceedings* to determine whether a proposed minority district will be effective. The rule is premised on a need to compensate for a variety of factors that have historically resulted in depressed minority electoral turnout.

affect African-American voting strength, and that creating the additional African-American district would adversely affect Hispanic voting strength. Faced with this conflict, the court concluded, the proper remedy for the Section 2 violation was to leave the State Plan for the Senate in place because it was the fairest allocation of political opportunity. J.S. App. 74a.

The court then "explained" its remedial order for the House. The court chose the modified De Grandy plan on the ground that it provided more assurance that the 11 Hispanic districts would be effective than did an alternative remedial plan offered by the House defendants. The court based this conclusion principally on what it described as the "testimony" of plaintiff De Grandy during the remedial proceedings. J.S. App. 71a.

Appellants challenge both the liability and the remedial holdings with respect to the House portions of the State plan.

SUMMARY OF ARGUMENT

The critical issue in this case is whether, as a result of its population size and geographic concentration, an ethnic minority can claim an entitlement under Section 2 of the Voting Rights Act to elect legislative representatives in numbers *greater* than the minority group's percentage of the population. The text of Section 2, and this Court's opinions in *Voinovich v. Quilter* and *Thornburg v. Gingles*, foreclose any such claim. Section 2 provides that a minority group will not have "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973. As a unanimous Court recently made clear in *Voinovich*, Section 2 *"simply does not speak to the matter"* unless a plaintiff can prove that a "reapportionment scheme has the effect of denying a protected class the *equal* opportunity to elect . . . candidate[s] of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) (emphasis added).

Under this standard, the district court's finding of a Section 2 violation must be reversed. The district court's own findings show that Hispanics in the Dade County area constitute approximately 45% of the voting age population, and have the opportunity to elect their preferred candidates in 45% (9 of 20) of the area's House Districts. This reapportionment plainly does not result in Hispanics in the Dade County area having "less than equal opportunity to participate in the electoral process and elect representatives of their choice." Thus, the fact that the State Plan does not create 11 Hispanic districts in this 20-district area provides no basis for a finding of Section 2 liability. (Points I.A. and I.B.).

Nor can the district court's finding of a Section 2 violation be sustained on the basis of the alternative theory now advanced by the United States: that 11 Hispanic-controlled districts should have been drawn in Dade County to ensure that Hispanics who live in other parts of the State where Hispanic-controlled districts cannot be created will be afforded "representation" in the Florida House of Representatives. At trial, plaintiffs neither alleged nor proved a single one of the *Gingles* preconditions on a statewide basis, and the district court did not make findings sufficient to support liability under this theory. The theory is, in any event, insupportable on the facts and the law. (Point I.C.).

The district court's liability determination should also be reversed because the court's finding that plaintiffs had proven the existence of 11 districts in which Hispanics could constitute a majority of the eligible voters was clearly erroneous under the standards set forth in *Thornburg v. Gingles*. Defendants' unrebutted evidence showed that approximately 55% of the County's Hispanics are not citizens, and plaintiffs conceded that Hispanic non-citizenship levels are approximately 50%. Defendants demonstrated that once citizenship is taken into account, Hispanic voters would not constitute a majority in many of the plaintiffs' proposed districts. Plaintiffs, who bore

the burden of proving vote dilution with "district specific" evidence, *Gingles,* 478 U.S. at 60, n.28, never accounted for the citizenship factor in their case at trial. Moreover, neither evidence that additional influence districts could have been created nor reliance on the "65% rule" were sufficient to satisfy the *Gingles* geographic compactness requirement. Accordingly, the trial court's finding that 11 Hispanic-majority districts could have been created was clearly erroneous. (Point II).

The district court also erred in even considering the Section 2 claims of the De Grandy plaintiffs. Those plaintiffs had previously raised, and received an adjudication of, identical Section 2 claims in the Florida Supreme Court. Principles of *res judicata,* full faith and credit, and comity dictate that the federal court should have refused to permit the De Grandy plaintiffs to relitigate those claims in federal court. The United States' claims should likewise have been dismissed because those claims required the federal district court to, in effect, engage in appellate review of a determination of the Florida Supreme Court. *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 (1983). (Point III).[37]

[37] Even if liability is affirmed, the district court's remedial order must be vacated, as the United States concedes. (Point IV).

ARGUMENT

I. THE DISTRICT COURT MUST BE REVERSED BECAUSE FLORIDA'S HOUSE REAPPORTIONMENT PLAN AFFORDS HISPANICS IN THE DADE COUNTY AREA THE OPPORTUNITY TO ELECT REPRESENTATIVES IN NUMBERS AT LEAST PROPORTIONAL TO THEIR PERCENTAGE OF THE AREA'S POPULATION

A. A Single-Member District Reapportionment Plan Does Not Violate Section 2 of the Voting Rights Act Unless Plaintiffs Prove That the Plan Does Not Afford a Protected Minority Group Equal Electoral Opportunity

"The task of resolving" the meaning of Section 2 of the Voting Rights Act "begins where all such inquiries must begin: with the language of the statute itself." *See United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989). The text makes clear that a reapportionment does not violate Section 2 unless "it is shown" that

> the political processes leading to nomination or election in the State . . . are not *equally open* to participation by a class of citizens protected by [the Act] in that its members have *less opportunity than other members of the electorate* to participate in the electoral process and elect representatives of their choice.

42 U.S.C. § 1973(b) (emphasis added).

Section 2 says nothing about maximizing the number of legislative districts in which a minority class can elect preferred candidates. Rather, the statutory text makes clear that plaintiffs alleging vote dilution cannot prevail unless they prove that their opportunity to elect preferred candidates is substantially disproportionate to their levels in the relevant population. That much is also clear from additional language in Section 2 providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This disclaimer plainly "implies that [minorities] who have influence proportional to their numbers do not state a [vote

dilution] claim". *See Baird v. City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) (Easterbrook, J.); *Nash v. Blunt*, 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (three-judge court), *aff'd sub nom., African-American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 61 U.S.L.W. 3682 (April 5, 1993).[38]

This Court's recent decision in *Voinovich v. Quilter* confirms that Section 2 plaintiffs must prove that a reapportionment plan denies them *equal* opportunity:

> Only if the reapportionment scheme has the effect of denying a protected class the *equal* opportunity to elect the candidate of choice does it violate § 2. Where such an effect has not been demonstrated, *§ 2 simply does not speak to the matter.*

Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993) (emphasis added). *See also id.* at 1155 (Section 2 protects "the ability of a protected class to elect its candidate of choice on an equal basis with other voters"); *Thornburg v. Gingles*, 478 U.S. at 46. Thus, the determinative Section 2 issue in every vote dilution case must be whether the challenged electoral practice denies equal opportunity.[39]

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[38] The legislative history confirms this understanding of Section 2. The Senate Report makes clear that the 1982 amendment to Section 2 was intended to "codify" the analysis employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See* S. Rpt. No. 97-417, 97th Cong. 2nd Sess. 196-201 & 204-213 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177. These cases hold that proving a *downward departure from proportionality* is not *sufficient* to demonstrate vote dilution, but also make clear that a showing of disproportionate results is *necessary*. *White*, 412 U.S. at 765-66 ("to sustain [a vote dilution claim] it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open . . . in that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice."); *accord Whitcomb*, 403 U.S. at 149.

[39] Permitting a minimal deviation to demonstrate a violation would "[i]nvit[e] attack on minor departures from some supposed norm [which] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (White, J.).

Furthermore, this Court's one-person one-vote jurisprudence recognizes that values of federalism and respect for the difficulties posed by state legislative reapportionment mandate that some leeway be provided for States to depart from a strict mathematical equality in order to vindicate state policies. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740-41 (1938).

In *Thornburg v. Gingles*, this Court devised a test for evaluating whether plaintiffs challenging *multi-member* districts had made a threshold showing of unequal electoral opportunity:

> First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group is " 'politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

See Voinovich v. Quilter, 113 S. Ct. at 1157 (summarizing *Gingles* threshold test for multi-member districts). The *Gingles* analysis compares the results in a multi-member district to results that would obtain if the multi-member district were divided into single-member districts. 478 U.S. at 50-51. If, as a result of racially polarized voting, a minority class is unable to elect its preferred representatives in the multi-member format and would be able to elect its preferred representatives in the single-member format, that is *prima facie* evidence that the multi-member format provides less than equal electoral opportunity.

The *Gingles* preconditions cannot, however, be mechanically transferred to the single-member district context. The preconditions remain relevant in single-member district cases, as this Court recognized in *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993), and *Voinovich v. Quilter*,

113 S. Ct. at 1157, because they establish a causal link between the way districts are drawn and the minority's electoral opportunities.[40] Without more, however, the *Gingles* preconditions establish very little about whether challenged single-member districts deny *equal* electoral opportunity. Both *Voinovich* and *Growe* make clear that proof of the *Gingles* factors does not amount to a showing of vote dilution in the single-member context. The Court's reservation of this issue was doubtless premised on a recognition of the important differences between multi-member districts and single-member districts.[41]

The *Gingles* preconditions identify situations in which an alternative electoral system may provide minority citizens more electoral opportunity than the State's system provides. In a multi-member district case, proof of such "diminished opportunity" generally indicates a *prima facie* denial of *equal* electoral opportunity because the multi-member format has an inherent tendency to deny a minority population the ability to elect representatives in proportion to its percentage of the population. The issue in multi-member cases is *whether* single-member districts might be drawn that would alleviate the dilution by allowing minorities to elect preferred candidates. In *single-*

[40] As the Court explained in *Growe*:

> The "geographically compact minority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

113 S. Ct. at 1084 (citations omitted).

[41] As a unanimous Court recently noted:

> multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts[.]

Growe v. Emison, 113 S. Ct. 1075, 1084 (1993). *Accord Thornburg v. Gingles*, 478 U.S. at 47; *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *Burns v. Richardson*, 384 U.S. 73, 88 (1966).

member district cases, however, the issue is *how many* single-member districts should be created in which minority voters can elect preferred candidates. That question would not even arise in a multi-member district case until the remedial stage of the proceedings.

The use of *Gingles* to identify additional single-member districts that hypothetically could be drawn does not answer the question of whether existing single-member districts deny a plaintiff class *equal* electoral opportunity. *Equal* opportunity is not denied merely because an apportionment fails to maximize the electoral opportunities of a minority class. Rather, whether the single-member districts in a challenged area deny equal electoral opportunity to a minority class depends in part on *how many* districts in the relevant geographic area afford that class an opportunity to elect its preferred candidates.

Indeed, as a matter of logic, the *Gingles* preconditions shed surprisingly little light on the critical issue of whether challenged single-member districts afford *equal* opportunity. For example, in a hypothetical 10-district jurisdiction with 100 voters per district (1,000 total voters), a group constituting only 50% of the population (500 voters) could control up to 9 of the 10 districts, so long as their geographic dispersion was such that 9 districts could be drawn each containing 51 members of the group ($9 \times 51 = 459$). Similarly, depending on how district lines are drawn, a group constituting only 38% of the population could control three of five legislative districts even when the minority group must have at least a 60% majority in a district to ensure election of a candidate of choice:

District	Group 1	Group 2	Total
1	0	20,000	20,000
2	0	20,000	20,000
3	12,666	7,334	20,000
4	12,666	7,334	20,000
5	12,668	7,332	20,000 [42]

[42] In this hypothetical, Group 1 makes up 38% of the population in an area which is to be divided into five districts of 20,000 persons

As these examples show, a mechanical application of the *Gingles* preconditions to single member districts amounts to a requirement that minority-controlled districts be maximized irrespective of whether the minority class has an equal opportunity to elect its preferred representatives.

For this reason, the *Gingles* preconditions, though necessary to show causation, cannot suffice to make out a *prima facie* case of vote dilution in single-member district cases. *See Gingles,* 478 U.S. at 94 (O'Connor, J., concurring) ("there is substantial doubt that Congress intended 'undiluted minority voting strength' to mean 'maximum feasible minority voting strength' "). Rather, a plaintiff class challenging single-member districts must be required to demonstrate that the challenged districts result in substantially unequal opportunity for that class to elect its preferred candidates. As a matter of law, such a showing should be foreclosed where the plan affords the plaintiffs the opportunity to elect preferred candidates in numbers commensurate with the plaintiffs' percentage of the population.

The Court has recognized this principle in related contexts. In *City of Richmond v. United States,* 422 U.S. 358 (1975), a case brought under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Court concluded that, if minority "power . . . is not undervalued, and [minorities] will not be underrepresented" in a challenged plan, it would be impermissible to require that they be structurally ensured a greater than proportional opportunity to elect candidates of choice because this would "perhaps permanently overrepresent[] them and underrepresent[] other elements in the community . . ." *Id.* at 371. The logic of *City of Richmond* is fully applicable here, and precludes a finding of vote dilution absent a showing of substantially less than proportional electoral opportunity.

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each. The availability of advanced computer systems, which were used by many States during their most recent reapportionments, and detailed census data make this scenario achievable.

Indeed, the requirement that plaintiffs show less than equal opportunity to elect is implicit in *Gingles* itself. To satisfy the *Gingles* threshold test, a plaintiff must demonstrate that "a white bloc majority must *usually* be able to defeat" candidates supported by the minority group. *Gingles,* 478 U.S. at 49. As the Court explained in *Gingles,* this condition cannot be satisfied "unless minority group members experience substantial difficulty electing representatives of their choice." *Id.* at 49, n.15. If the minority group is able to elect a proportionate number of candidates, it cannot be said that the minority group's preferred candidates are "usually" defeated or that the minority group has "difficulty in electing" such candidates. *Id.*[43]

Accordingly, six Justices squarely held in *Gingles* that the "appellees failed to establish a violation of §2 in District 23" because the minority community in that district had historically elected a proportionate number of its preferred candidates. *Id.* at 105 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.); *id.* at 77 (Brennan, J., and White, J.) (same).

Of course, a *prima facie* case merely begins the judicial inquiry. Section 2 does not guarantee proportionate electoral results.[44] The statute specifically requires analy-

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[43] If, in this case, the *Gingles* preconditions were applied not to the two specific additional Hispanic districts identified by plaintiffs, but to the 20-district Dade County area in which plaintiffs allege vote dilution occurred, the preconditions would not be made out on this record. Plaintiffs cannot show that racial bloc voting usually defeats Hispanic-preferred candidates, or substantially impairs the ability of Hispanic voters to elect their preferred House candidates, because Hispanics can elect representatives in numbers commensurate with the Hispanic percentage of the voting age population. This is exactly how the Seventh Circuit recently analyzed a similar issue. *See Baird v. City of Indianapolis,* 976 F.2d at 360.

[44] Appellants do not suggest that the degree of minority electoral success should be determinative. Section 2 is intended to ensure equal access to the political process, not proportional representation. However, because Section 2 analysis focuses on expected electoral results at the *prima facie* stage, it is particularly important that

sis of the "totality of the circumstances," in which "a court should consider all relevant factors bearing on whether the minority group has 'less opportunity than other members of the electorate[.]'" *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring).[45] It is simply not enough that a minority class has not elected representatives in proportion to its population levels. This failure to elect must, at bottom, be the product of a political system largely closed to the minority class. A Section 2 vote dilution challenge to the way single-member districts are drawn should not even proceed to this stage, however, unless plaintiffs have made a *prima facie* showing of *unequal* electoral opportunity.

B. A Proper Understanding of Section 2 Requires Reversal of the District Court's Finding That Florida Violated Section 2 By Failing to Create 11 Hispanic Districts in the Dade County Area

This Court must reverse the district court's finding that the State Plan violated Section 2 because plaintiffs did not prove, and the district court did not find, that Florida's reapportionment of the House seats for the Dade County area afforded Hispanic voters "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." Plaintiffs, therefore, did not even establish a *prima facie* case that would require a court to consider the "totality of the circumstances."

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plaintiffs be required to demonstrate that the electoral plan under challenge produces inequalities. It is also particularly important that, in cases where the *prima facie* showing of unequal electoral opportunity is made on the basis of anticipated electoral results, the reviewing court conduct a searching "totality of the circumstances" analysis to determine whether apparently unequal results are in fact indicative that a State's electoral system is closed to the plaintiff class.

[45] This analysis must also focus on a "State's justification for its electoral system." *See Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 111 S. Ct. 2376, 2381 (1991). *Cf. Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

The district court found that "Florida's House reapportionment plan creates twenty Dade County districts." J.S. App. 67a. The district court found that forty-five percent of those districts (9 of 20) will elect Hispanic-preferred candidates. J.S. App. 67a. Hispanics constitute approximately 45% of the voting age population of this 20-district area.[46] Furthermore, another district within the 20-district area contains an Hispanic voting age population of more than 45%, which may well afford Hispanics the ability to elect their preferred candidate in the near future.

Despite this evidence, the district court never asked the critical question: does the State Plan afford Hispanics in the Dade County area "less than equal opportunity to participate in the political process and elect representatives of their choice"? Instead, in its July 2, 1992 oral ruling, the district court held that the State Plan violated Section 2 because "plaintiffs have shown that more . . . districts may be drawn" than were drawn by the Florida legislature. VIII Tr. 82, J.S. App. 203a. The court reached this result by comparing the State Plan to alternative redistricting plans expressly designed to "maximize" the number of Hispanic-controlled districts in the Dade County area.[47] Similarly, the court's July 17, 1992, opinion focused exclusively on whether the three *Gingles* preconditions were met. At bottom, the district court in this case held that proof of the *Gingles* preconditions was both necessary *and* sufficient to sustain a Section 2 challenge.

The district court's mechanistic application of *Gingles* converted Section 2 into a requirement that minority electoral opportunity be maximized even where maximization would exceed proportional electoral opportunity.[48]

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[46] *See* note 10, *supra*.

[47] *See* note 31, *supra*, and accompanying text.

[48] If this holding were correct, States would be trapped in an endless cycle of Section 2 violations. The very relief accorded to one set of plaintiffs—the maximum possible number of districts—would

In essence, the district court treated *Gingles* as though it were itself a statute, rather than a threshold judicial test for ascertaining a possible denial of equal electoral opportunity. Thus, the district court asked only whether more minority districts could be drawn, but did not ask the "right question"—whether the failure to draw these districts denied plaintiffs " 'an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 U.S. at 44 (quoting S. Rep. at 28). Had the district court asked the right question, the court could not have concluded that the State Plan denied equal electoral opportunity. The State Plan plainly affords Hispanics in the Dade County area the opportunity to elect representatives of their choice in numbers commensurate with the Hispanic population percentage of the area.[49]

Even if plaintiffs had made a *prima facie* case of vote dilution—and they did not—the district court should be reversed. The court's excessive focus on the *Gingles* preconditions effectively precluded the searching "totality of the circumstances" analysis that Section 2 requires. *See Gingles*, 478 U.S. at 103 (O'Connor, J., concurring). It is simply implausible to argue that the political processes are not equally open to Dade County's Hispanic

itself create a new Section 2 violation as to another plaintiff class, whose voting strength would be diminished by the remedial plan. The district court's holding that the Senate Plan violated Section 2 —but could not be remedied—clearly demonstrates the perverse results which the court's theory entails.

[49] Indeed, once citizenship levels are properly taken into account, the State Plan provides Hispanic voters more electoral opportunity than their proportionate share of the citizen voting age population. Although the precise figures are disputed by the parties, there is no dispute that upwards of half of Dade County's Hispanic population is non-citizen. Because, as will be demonstrated *infra*, Section 2 protects the voting rights of citizens, there is no credible argument that the House reapportionment resulted in vote dilution. Indeed, once citizenship levels are taken into account, it would appear that Hispanic citizens have substantially more electoral opportunity than do Anglo citizens and African-American citizens in the Dade County area.

population. Within 2 decades of their arrival in substantial numbers, Dade County's Cuban-American population (the County's dominant Hispanic group) has become a powerful political force. Prior to the 1982 reapportionment, one member of the Florida House of Representatives was an Hispanic from Dade County. Stipulated Facts at ¶ 93, J.A. 27. As a result of the 1982 reapportionment, four Hispanics from Dade County were elected to the House. By the end of the 1980s, without any alterations of the districts drawn in the 1982 plan, seven Hispanics from Dade County held seats in the Florida House and two held seats in the Florida Senate. *Id.*[50] The State Plan for the 1990s increases those numbers. If plaintiffs have not yet achieved the measure of electoral success to which they aspire, that is plainly not the result of a denial of equal access to the political process.

C. The District Court's Judgment Cannot Be Sustained on Any Alternative Ground

Because the State Plan indisputably provides the plaintiff class with equal electoral opportunity in the Dade County area, Appellees now seek to defend the district court's judgment on grounds different from those they alleged at trial. The United States claims that the unarticulated "premise" of its case at trial "was that to remedy vote dilution throughout the State, the State was required to draw minority districts where it could"—*i.e.*, in Dade County. U.S. Motion to Affirm in No. 92-519, at 12. In other words, Appellees now argue that the Voting Rights Act requires the State of Florida to provide His-

[50] Also, during the 1980s, Hispanics were elected Governor of Florida, Mayor of Miami and Mayor of Hialeah. Moreno Affidavit at ¶¶ 27, 29, 36, J.A. 183, 184, 188. Hispanics were elected in substantial numbers to the Dade County Commission, the Dade County School Board, and other County offices. Stip. Facts at ¶¶ 72-75, J.A. 21. Hispanics constitute the majority of city commissioners in Hialeah, Miami, Sweetwater, Virginia Gardens, and West Miami. *Id.* at ¶ 92, J.A. 26. An Hispanic, Ileana Ros-Lehtinent, was elected to the United States Congress from Dade County in 1989. Moreno Affidavit at ¶ 34, J.A. 187.

panics in the Dade County area with *more* than proportional representation—at the expense of *other* Dade County populations—in order to ensure that Hispanics living in *other* parts of the State are "represented" in the Florida House of Representatives. This theory of liability—which appears nowhere in the District Court's lengthy opinion—finds no support in the record, cannot be squared with the compactness requirement of *Gingles*, and is incompatible with basic notions of representation in our system of government.

First, Appellees never tried to put on such a case at trial. The United States' complaint expressly alleged vote dilution in the 20-district "Dade County area."[51] Had the United States been advancing a theory of statewide vote dilution, there would have been no reason to identify this 20-district "Dade County area" as the area in which the alleged vote dilution occurred. The De Grandy plaintiffs initially alleged vote dilution in other counties, but offered no proof of those claims, and moved to dismiss the claim on the third day of trial. The following colloquy ensued:

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[51] Complaint of the United States at ¶¶ 8(a), 8(c), J.A. 75:

> In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts.
>
> . . .
>
> The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interest and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority in two additional districts in the House of Representatives.

It should be recognized that this allegation mixes apples and oranges. Dade County is 50.5% Hispanic. But the 20-district Dade County area identified in the complaint is only 46.6% Hispanic. *See* note 10, *supra*.

> Judge Vinson: . . . De Grandy has already announced this morning that they're only pursuing Dade and Escambia Counties, correct?
>
> Mr. Cardenas: Yes, sir.

III Tr. 213. Immediately thereafter, Judge Stafford noted that this dismissal would "conform[] the pleadings to the eivdence," III Tr. 214, and Judge Hatchett entered the following ruling on the motion:

> The motion to dismiss is granted. Now that means that on the House side, the only attack is to Escambia County and Dade County. Everyone understand that? All of those other counties are out of the case.

III Tr. 214-15. Even if plaintiffs had been pursuing a statewide theory, their silence in the face of Judge Hatchett's statement waived any claims of vote dilution outside Dade and Escambia Counties. With respect to Escambia County, which is hundreds of miles from Dade County, plaintiffs alleged only African-American vote dilution, and that allegation was not litigated to a final judgment. Thus, *all* allegations of Hispanic vote dilution that proceeded to judgment involved Dade County. *See Brown v. Thomson*, 462 U.S. 835, 846 n.9 (1983).[52]

Second, appellees never proved the *Gingles* factors on a statewide basis. It is elemental that Section 2 plaintiffs must prove the existence of the *Gingles* preconditions. They cannot be assumed. *Growe*, 113 U.S. at 1085; *Gingles*, 478 U.S. at 46. It is also elemental that such proof must be co-extensive with the geographic area in which vote dilution is alleged. *Brown*, 462 U.S. at 846.

In particular, plaintiffs failed to prove the second *Gingles* precondition—that Hispanics in other parts of Florida are

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[52] In *Brown*, the Court refused to consider the constitutionality of the State of Wyoming's state legislative apportionment plan outside of Niobrara County because the "Appellants deliberately [] limited their challenge to the alleged dilution of their voting power" in that county. 462 U.S. at 846. The Court held that there is "no reason why [the plaintiffs] should not be bound by the choices they made when filing this lawsuit."

politically cohesive with Dade County Hispanics. Indeed, appellees argument suffers from exactly the flaw that led to reversal of the district court in *Growe v. Emison*. As this Court explained, where "dilution of the power of [] an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." 113 S. Ct. at 1085. Since "a court may not presume bloc voting even within a single group," *id.*, this Court may not simply assume that Hispanics outside the Dade County area would be politically cohesive with Hispanics in the Dade County area. *See also Gingles*, 478 U.S. at 50-51 & n.17.

Moreover, the trial evidence refutes any claim of statewide cohesion. Plaintiffs' own expert on political cohesion, Dr. Dario Moreno, testified that he did not "look into" Hispanic political cohesion outside Dade County. III Tr. 292.[53] Plaintiff De Grandy testified that Representative Martinez, an Hispanic representative elected by the Hispanic population of Tampa, was not a member of the Hispanic Caucus because he was a Democrat who did not share the political views of Caucus members. De Grandy Testimony, IV Tr. 42-43, 52. All members of the Caucus are Cuban-Americans from Dade County, and all are Republican. Furthermore, plaintiffs' expert witnesses uniformly stressed that Dade County's Hispanic population was strongly Republican, and polarized with respect to African-Americans.[54] One testified that Hispanics in other parts of Florida were primarily Democrats who were politically cohesive with African-Americans. He specifically testified that Hispanics in the Tampa area [55] and the Palm Beach

[53] During the prior hearing on the congressional plan, Dr. Moreno similarly testified that he had "not looked at any data outside Dade County." IV Congressional Plan Trial Transcript ("Cong. Tr.") 317.

[54] *See, e.g.*, Moreno Affidavit at ¶¶ 25-29, J.A. 182-184.

[55] Affidavit of Dr. Thomas B. Hofeller at 7 ("Tampa's Hispanic community is predominantly Democrat and, as noted by the Department of Justice, is cohesive with black voters.") (June 22, 1992), J.A. 164.

area were politically cohesive with African-Americans, and voted for Democratic candidates.[56]

Plaintiffs also failed to prove the third *Gingles* precondition—that racial bloc voting usually defeats Hispanic candidates in other parts of Florida. Such evidence is critical to any "statewide" theory of dilution. It would make no sense to provide "virtual" representation of Hispanics who live outside the Dade County area by creating additional Hispanic-controlled districts in Dade County if those Hispanics can elect preferred candidates where they live and vote.

The trial record, moreover, makes clear that Hispanic voters in other parts of Florida *do* have the opportunity to elect their preferred candidates to the House of Representatives. For example, Hispanic voters in the Tampa area have for many years elected Representative Elvin Martinez, and will continue to have the opportunity to elect their preferred candidates under the State Plan. And, as plaintiffs' own expert testified, Hispanic voters in other parts of Florida are able to elect preferred candidates by allying with other voters.[57] Thus, appellees' theory of Section 2 liability must be reversed because "the *Gingles* preconditions were not only ignored but were unattainable." *Growe*, 113 S. Ct. at 1085.

Third, appellees' theory of liability is foreclosed as a matter of law because it effectively reads the first *Gingles* requirement—"compactness"—out of the law. As the Court explained in *Gingles*:

> [t]he reason that a minority group . . . must show, as a threshold matter, that it is *sufficiently large and*

[56] *See id.* at 7 (in the Palm Beach area, "[t]he district has an 11% hispanic population—primarily farm workers; who traditionally vote Democratic."), J.A. 167. Dr. Thomas B. Hofeller is Director of the Republican National Committee Reapportionment Office. He testified that "the goal of the committee for which I work is to elect as many Republicans as it can." X Cong. Tr. 59.

[57] Hofeller Affidavit at ¶ 28, J.A. 167.

> *geographically compact* to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50, n.17 (emphasis added).

The State Plan causes no hypothetical dilution of the voting strength of Hispanic residents outside Dade County —no showing has been made that those voters could elect preferred candidates under an alternative districting arrangement. Appellees' theory thus proposes to remedy vote dilution that has not been proven to exist.

Moreover, the *Gingles* compactness requirement must be understood as a rejection of the theory of "virtual" representation appellees now advance. The court could have chosen to interpret Section 2 to require that districts be drawn elsewhere if a minority population was not sufficiently numerous and compact, or it could have required States to draw non-contiguous districts to combine disparate minority population centers. The Court's choice of the compactness requirement quite properly recognizes that Section 2 was not intended to invalidate traditional geographic-based representation on which all state and federal legislative bodies are premised. Appellees' approach rests on the assumption that Hispanic legislators from Dade County, a densely populated urban area with substantial coastal and tourist industries, can effectively represent the interests of Mexican-American farm workers living in sparsely populated rural areas of Florida hundreds of miles away.[58]

Indeed, *Gingles* expressly rejected an identical argument. The district court found vote dilution with respect to District 23, despite the persistent proportional representation achieved by minorities in that district, because

[58] Pensacola, Florida, for example, is closer to St. Louis, Missouri than to Dade County. Indeed, Pensacola is closer to Indianapolis, Indiana than to Key West (which is part of the 20-district Dade County area at issue).

the "overall results" achieved by African-Americans in North Carolina fell far short of proportional representation based on the statewide African-American population.[59] This Court *reversed* the finding of liability with respect to District 23. As Justice O'Connor's concurring opinion explained, "[t]he district court clearly erred to the extent that it considered electoral success in the aggregate rather than in each of the challenged districts, since . . . 'the inquiry into the existence of vote dilution is district specific.'" 478 U.S. at 103; *see also id.* at 60, n.28.[60]

Fourth, even if Appellees' theory of liability were valid, the State Plan would nonetheless pass muster. As the United States has conceded on the basis of U.S. Census data, Hispanic citizens are proportionally represented in the Florida House of Representatives *on a statewide basis*.[61] Census Bureau data, which were available to the Department of Justice but not to appellants at the time of trial, show "that Hispanics constitute 7.15% of the citizen voting age population of Florida. Thus, if a plan had

[59] *Gingles v. Edmisten*, 590 F. Supp. 345, 367 (E.D.N.C. 1984).

[60] This Court's recent ruling in *African-American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 61 U.S.L.W. 3682 (U.S. April 5, 1993), which summarily affirmed the three-judge court's ruling in *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), confirms this reading of *Gingles*. In *Nash*, the plaintiffs challenged a reapportionment plan which provided African-Americans in relevant geographic areas with representation proportionate to the African-American populations in those areas. The plan did not, however, provide statewide proportional representation. The plaintiffs argued that additional African-American districts should have been created in areas of significant minority concentrations to ensure that, on a statewide basis, African-Americans had a proportionate share of seats. The district court rejected this theory of Section 2 liability. *Nash v. Blunt*, 797 F. Supp. at 1499. That portion of the district court's ruling was specifically challenged in the appellants' jurisdictional statement. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance "reject[s] the specific challenges presented in the statement of jurisdiction").

[61] *See* United States Motion To Affirm In Part And Vacate In Part, *Wetherell v. De Grandy*, No. 92-519 (U.S. Nov. 20, 1992).

been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats (120 x 7.15% = 8.58)." U.S. Motion to Affirm at 14, n.5. The State Plan includes nine districts in Dade County and one district in the Tampa area where Hispanic voters elect their preferred representative.[62] Therefore, Hispanic citizens are afforded the opportunity to elect more than a proportionate number of candidates of choice on a statewide basis.[63]

Section 2 protects the "right of any *citizen* of the United States to vote." A violation is shown only if "the political processes leading to nomination or election . . . are not equally open to participation by members of a *class of citizens*." 42 U.S.C. § 1973 (emphasis added). *See also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988) ("those ineligible to vote have not experienced a dilution of their vote" and may not be "parties to a Section 2 claim"), *cert. denied*, 490 U.S. 1031 (1989). Thus, proof of statewide proportionality for Hispanic *citizens* defeats appellees' statewide theory of liability.

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[62] There also is a district in Dade County in which Hispanics constitute 46% of the voting age population.

[63] This Court can rely on this Census data. Federal Rule of Evidence 201 authorizes judicial notice of a fact "at any stage of the proceeding," Fed. R. Ev. 201(f), including on appeal, 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5110, at 524-25 (1977), and at 270, n.15 (1992 Supp.) (both collecting cases). Courts routinely take judicial notice of Census data. *See, e.g., Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1157 (5th Cir. 1981) (redistricting case); *Neal v. Coleburn*, 689 F. Supp. 1426, 1428 (E.D. Va. 1988) (same).

II. THE DISTRICT COURT'S FINDING THAT HISPANIC VOTERS ARE SUFFICIENTLY NUMEROUS AND GEOGRAPHICALLY COMPACT TO CONSTITUTE A MAJORITY IN ADDITIONAL SINGLE-MEMBER DISTRICTS WAS CLEARLY ERRONEOUS

Even with respect to Dade County, the district court's conclusion that the plaintiffs satisfied the geographic compactness component of *Gingles* was clearly erroneous. To satisfy this requirement, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to *constitute a majority* in a single-member district." *Gingles*, 478 U.S. at 50 (emphasis added). Because "the purpose of [this requirement] is to first determine whether minorities are capable of commanding a majority vote in [additional] single-member district[s]," *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989) (Kozinski, J.), a plaintiff must submit evidence of the voting strength of eligible voters to satisfy it. Only United States citizens can vote for public office in Florida. Therefore, the voting strength of the plaintiff class must be assessed on the basis of its citizenship levels. *See id.* at 1426; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

In this case, the plaintiffs based their claim of vote dilution on the total Hispanic voting age population (VAP) of Dade County. In Florida, however, Hispanic VAP is not a good estimate of voting strength because many Hispanics are not citizens. Defendants introduced expert testimony showing that 55% of Dade County's Hispanic population were not citizens. Plaintiffs contested this figure, but even plaintiffs' expert conceded that approximately half of the Hispanics in Dade County were not citizens. *See* Declaration of Allan J. Lichtman at ¶ 7 (June 30, 1992), J.A. 216.[64]

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[64] Defendants introduced the expert demographic testimony of William DeGrove showing that substantial portions of the voting

Plaintiffs made no effort to rebut this citizenship evidence. Instead, at trial, counsel for plaintiffs argued that requiring a showing of voting strength based on eligible voters "cannot be the law in this country." VIII Tr. 69, J.A. 485-86. The District Court agreed, ruling "as a matter of law that the relevant inquiry . . . is voting age population," and that "citizenship is not important." V Tr. 40, 47, J.A. 453, 455. Thus, when the district court entered judgment on July 2, 1992, it did so on the basis of the belief that it need not take citizenship into account in assessing Hispanic voting strength in Dade County.

In its July 17, 1992 opinion, the district court offered a different rationale. There, the court noted plaintiffs' expert testimony that Hispanic districts above 59% would be effective, J.S. App. 36a, and pointed to the "65% rule," which posits that supermajorities are needed in minority districts to account for factors that affect Hispanic turnout. The court stated that: "because each of the [plaintiffs' 11 proposed] districts contains a 60% Hispanic VAP and, therefore, 'satisfies' the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district." J.S. App. 40a.[65] The court then found that each of the plaintiffs' proposed districts "would . . . contain[] effective Hispanic voting majorities." *Id.* It is unclear whether the district court relied on the "65% rule" or on plaintiffs' expert testimony. This ruling was clearly erroneous in either event.

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age Hispanic population consisted of non-citizens. Based on standard court-accepted bivariate regression analysis, and recently released U.S. Census data on citizenship levels, DeGrove adjusted voting age population figures on a district-by-district basis for plaintiffs' proposed districts, and determined that Hispanic eligible voter levels fell below 50% in 8 of plaintiffs' 11 proposed Hispanic majority districts. DeGrove Testimony, VII Tr. 5-24, J.S. App. 187a-198a.

[65] The conclusion that 60% was adequate was based at least in part on the court's belief that, "[b]ecause the 65 percent rule already accounts for citizenship, making another adjustment for citizenship would overstate its importance and lead to double counting." J.S. App. 40a.

A. The Court's Reliance on the "65% Rule" Was Clearly Erroneous

The "65 percent rule" cannot support the district court's conclusion that the first *Gingles* precondition was met. The "65 percent rule" on which the district court relied is a benchmark for drawing *remedial plans. See Ketchum v. Byrne,* 740 F.2d 1398 (7th Cir. 1984), *cert. denied,* 471 U.S. 1135 (1985). To account for a minority community's generally younger median population age, lower voter registration patterns, and lower voter turnout, the "65 percent rule" suggests that remedial plans should generally include districts containing a 65% minority population to assure their effectiveness. *Id.* at 1415.

This general rule comes into play only *after* a plan has been found to violate Section 2; it may not be used as a presumption to prove that the first *Gingles* precondition is met. By relying upon such a presumption, the court disregarded the command of *Gingles* that plaintiffs' prove Section 2 vote dilution claims with district-specific evidence. "[C]ourts must not *rely* on data aggregated from all the challenged districts," 478 U.S. at 60 n.28, because vote dilution challenges require an "intensely local appraisal." *Thornburg v. Gingles,* 478 U.S. at 78 (quoting *White v. Regester,* 412 U.S. 755, 769-70 (1973)). As this Court emphasized in *Growe,* such a local appraisal forbids reliance on general studies or presumptions to satisfy the *Gingles* preconditions. *Growe,* 113 S. Ct. at 1085. Thus, the 65% rule cannot support a finding of liability.

Even if the application of the 65% rule may in some circumstances be appropriate, that presumption must be rejected if actual data is available. Indeed, *Ketchum v. Byrne,* the very case that first articulated the "65 percent rule," made clear that this presumption should be used only when actual data is unavailable. *See generally Ketchum,* 740 F.2d at 1416; *Nash v. Blunt,* 797 F. Supp. at 1499. The defendants submitted actual data to demonstrate that the eligible Hispanic voting age population would constitute a majority in only 3 of 11 districts proposed by

the plaintiffs. Plaintiffs' expert at trial conceded that approximately one-half of the Dade County Hispanic VAP were not citizens. *See* Lichtman Declaration at ¶ 7, J.A. 216. Thus, even if the "65 percent rule" could be relied upon to demonstrate satisfaction of the geographic compactness requirement—and it may not—it would not suffice in this case. The district court's refusal to consider appellants' actual data effectively elevated the "65 percent rule" into an irrebuttable presumption which is not permissible in this context.

B. The Court's Reliance on "Influence" District Evidence Was Clearly Erroneous

The district court's ruling is also clearly erroneous to the extent it relies on the testimony of plaintiffs' expert, Dr. Allan Lichtman. He expressly testified that plaintiffs' proposed districts would be "effective" in the sense that Hispanic voters in those districts could elect preferred candidates when their vote was combined with the substantial white cross-over vote in those districts.[66] In other words, Dr. Lichtman testified that most of plaintiffs' proposed 11 Hispanic districts would be "influence" districts, as this Court recently defined that term in *Voinovich v. Quilter*. 113 S. Ct. at 1149.[67]

This Court has not yet determined whether the failure to create influence districts may violate Section 2.[68] There

[66] Dr. Lichtman himself found that, in the elections he relied upon to conclude that the proposed districts would be "effective," there had been "a mean white vote of 24% for Hispanic candidates." Lichtman Affidavit at ¶ 7, J.A. 208. *See also* Lichtman Declaration at Table 1 (finding districts that would not contain a Hispanic majority would nevertheless be effective Hispanic districts because of the substantial white cross-over vote in those districts).

[67] In *Voinovich v. Quilter*, the Court explained that in an "influence district," minority voters "could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." 113 S. Ct. at 1155.

[68] *See Voinovich v. Quilter*, 113 S. Ct. at 1155 (expressly reserving question); *Growe v. Emison*, 113 S. Ct. at 1084, n.5 (same).

is reason to doubt whether such a failure violates Section 2 under any circumstances. *See Turner v. Arkansas*, 784 F. Supp. 553, 567-71 (E.D. Ark. 1991) (three-judge court), *aff'd*, 112 S. Ct. 2296 (1992). Indeed, the position of the United States in this litigation, which is based on Dr. Lichtman's testimony, would appear to be directly at odds with the position of the United States in *Voinovich v. Quilter* where the United States argued that the failure to create "influence districts" may *not* violate Section 2.[69]

But, at a minimum, the district court's judgment cannot be sustained merely on the basis that more "influence" districts might have been drawn.[70] The district court did not even purport to consider whether the State Plan denied equal electoral opportunity based on evidence that it created a slightly smaller number of districts in which Hispanic voters would have a strong chance to elect preferred candidates, rather than a larger number of districts in which Hispanic voters would have less opportunity to prevail because they would be dependent on substantial Anglo cross-over voting.

Moreover, permitting a Section 2 plaintiff to advance such a theory of liability raises intractable problems. States would be subjected to Section 2 challenges no matter which option they chose: a plan with strong minority districts would be susceptible to a challenge that a larger number of "influence" districts should have been created,

[69] *See* Brief for the United States in No. 91-1618, July 31, 1992, at 16 ("the legal theory adopted by the district court is directly at odds with the first *Gingles* precondition because it assumes that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population. . . . We agree with those courts that have rejected such a notion.").

[70] Perhaps in reliance on Dr. Lichtman's testimony, the district court found that plaintiffs' proposed districts contained "*effective* Hispanic voting majorities." J.S. App. 40a (emphasis added). Dr. Lichtman's testimony would not support a finding that the proposed districts satisfy the geographic compactness requirement because, as Dr. Lichtman himself admitted, "I haven't studied citizenship levels at all in Dade County." Lichtman Testimony, III Tr. 73, J.A. 373.

and a plan with a larger number of "influence" districts would be susceptible to a *Gingles* challenge that majority-minority districts should have been created. Endorsing this theory of Section 2 liability would thus permit plaintiffs—rather than State legislautres—to determine the manner in which the requisite "equal opportunity" is assured.[71] Such an intrusion on legislative sovereignty is exactly what this Court's numerous admonishments that " 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court' " prohibit. *Growe*, 113 S. Ct. at 1081 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 1975)).

III. THE DISTRICT COURT SHOULD HAVE DISMISSED PLAINTIFFS' CLAIMS BASED ON RES JUDICATA AND TRADITIONAL PRINCIPLES OF FEDERALISM

The district court refused to dismiss the plaintiffs' Section 2 challenges to the State Plan, notwithstanding that the De Grandy plaintiffs: (i) raised the identical claims *first* in a proceeding before the Florida Supreme Court and demanded that the court take jurisdiction over the claims; (ii) obtained the ruling they requested; and (iii) ignored the state court's offer of further consideration after a full evidentiary hearing. The District Court's refusal to dismiss was error.

This Court recently reaffirmed that the " '[t]he power of the judiciary of a State to require valid reapportionment . . . has not only been recognized by this court but appropriate action by the States in such cases has been

[71] It also would leave the State permanently unable to satisfy Section 2 because "[u]ndoubtedly some of [the minority] voters, as shown by this lawsuit, would prefer a more even distribution of minority groups among the . . . districts" while other minority voters would prefer fewer districts—like the State Plan's Hispanic House districts—in each of which the success of the minority preferred candidate was almost assured. *See Wright v. Rockefeller*, 376 U.S. 52, 57-58 (1964).

specifically encouraged.' " *Growe v. Emison*, 113 S. Ct. at 1081 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). Thus, when a state supreme court enters a judgment resolving a reapportionment issue, "[*a*]*t the very least*, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligates the federal court[s] to give that judgment legal effect[.]" *Id.* at 1082 (emphasis added).

The District Court erred by failing to accord the Florida Supreme Court's judgment full faith and credit, and in refusing to dismiss the De Grandy plaintiffs' claims based on principles of *res judicata*. The De Grandy plaintiffs were parties before the Florida Supreme Court.[72] At their behest, the Florida Supreme Court considered a Section 2 challenge to the State Plan. The court afforded them "a full and fair opportunity to litigate" these claims. *Allen v. McCurry*, 449 U.S. 90, 104 (1980). The court accepted briefs and evidentiary submissions, including alternative plans, *see* J.S. App. at 105a & 113a, and demonstrated that it was both "willing and able to protect" the plaintiffs' asserted federal rights. *Allen*, 449 U.S. at 104. Indeed, the court expressly retained jurisdiction to permit challengers to make an additional evidentiary showing before a commissioner on an expedited basis. *See* J.S. App. at 124a. The De Grandy plaintiffs chose not to avail themselves of this opportunity and instead brought the same Section 2 claims to federal district court. "The fact that [a party] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982). The Florida Supreme Court's judgment thus precludes relitiga-

[72] The preclusion principles must be applied to the claims of each party "as if [they] stood alone." *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 928-29 (1975) (requiring independent application of abstention principles to each individual party). *See also Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338-42 (5th Cir. 1982); *Smith v. United States Auto. Ass'n*, 259 So.2d 501 (Fla. App. 1st 1972) (same).

tion of any claims that were or could have been litigated. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984).

In such circumstances, the federal courts must give the state court judgment the same preclusive effect that a Florida court would. *See University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Allen, supra.* Under Florida law, the Florida Supreme Court's judgment is entitled to *res judicata* effect. *Personnel One, Inc. v. John Sommerer & Co.*, 564 So.2d 1217, 1218 (Fla. App. 3d 1990). *See also generally Avant v. Hammond Jones, Inc.*, 79 So.2d 423 (Fla. 1955). Indeed, Art. III, § 16 of the Florida Constitution specifically bars subsequent litigation of challenges to new state legislative districts after the Court has completed its review of the reapportionment plan. *See* Fla. Const. Art. III, § 16(d); *Florida ex. rel. Landis v. Thompson*, 163 So. 270 (Fla. 1935). As *Growe* makes clear, the district court was obligated to give preclusive effect to the ruling as well.[73]

The Section 2 claims of the United States should likewise have been dismissed because those claims effectively required the district court to sit in judgment of the Florida Supreme Court on the Section 2 issues. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). "[T]o reverse or modify [a] judgment [of the state supreme court] . . . would be an exercise of appellate jurisdiction," *Rooker*, 263 U.S. at 416—which is exactly what this Court's decisions in *Rooker* and *Feldman* prohibit.

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[73] Moreover, as a three-judge court properly concluded in an identical situation, principles of comity and federalism underlying the abstention doctrine require dismissal in this context. *See Members of the California Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925, 929 (N.D. Cal. 1992) (three-judge court). *See also Pennzoil v. Texaco*, 481 U.S. 1, 11 (1987). *See also Middlesex Co. Ethics Committee v. Garden State Bar. Ass'n*, 457 U.S. 423, 431 (1982); *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The *Rooker/Feldman* doctrine bars federal court review of state adjudicative actions. *See Feldman*, 460 U.S. at 482 and n.15. In *Feldman*, the Court explained that adjudicative acts involve the application of existing laws to the facts of a particular case. *See Feldman*, 460 U.S. at 479. *See also Blake v. Papadakos*, 953 F.2d 68, 72 (3rd Cir. 1992). In this case, the Florida Supreme Court considered a Section 2 and several constitutional challenges to the State Plan and determined that the State Plan was in compliance with those provisions. The "adjudicatory" nature of this proceeding is heightened by the fact that the Florida Supreme Court "provided a detailed discussion of relevant law and its application." *Id.* at 73, n.4. A federal court is therefore prohibited from reviewing the resulting judgment. *See, e.g., Feldman*, 460 U.S. at 479.[74]

IV. THE REMEDY IMPOSED BY THE DISTRICT COURT MUST BE VACATED.

Even if the district court's liability determination is affirmed, its remedial order must be vacated, as the United States has conceded.[75]

This Court has repeatedly made clear that, "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). For this reason, a court

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[74] *See also, e.g., Liedel v. Juvenile Court of Madison Co., Ala.*, 891 F.2d 1542, 1545 (11th Cir. 1990) (where requested relief "would effectively nullify [] state orders," review barred); *Anderson v. State of Colorado*, 793 F.2d 262, 264 (10th Cir. 1986) ("[T]his lawsuit essentially seeks to undo the [] decision of the Colorado state court. Therefore, it fits squarely within the parameters of the [*Rooker*]-*Feldman* doctrine prohibiting federal district courts from reviewing state-court judgments.").

[75] *See* United States Motion To Affirm In Part And Vacate In Part at 20, *Wetherell v. De Grandy*, No. 92-519 (U.S. Nov. 20, 1992).

must "give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." *Id.* In the present case, the district court transgressed this core principle of federalism by denying the State of Florida any appropriate opportunity to devise a remedial plan. Instead of permitting the State of Florida to construct a reapportionment plan consistent with the court's liability determination, the district court rushed to enter a remedial plan drawn by the De Grandy plaintiffs—and did so a mere five hours after the liability determination. Indeed, the district court did not even afford defendants a meaningful opportunity to study and comment on the plaintiffs' proposed remedy.

The district court's remedial order also invaded the State's traditional discretion to draw its own district map according to its own conception of the State's interests. As *Upham v. Seamon*, 456 U.S. 37 (1982), makes clear, a "district court's modifications of a state plan [must be] limited to those necessary to cure any constitutional or statutory defect," 456 U.S. at 43, and must "defer to the legislative judgments the [original] plan [] reflect[s]" to the maximum extent feasible. *Id.* at 40-41; *see also White v. Weiser*, 412 U.S. 783, 795 (1973). The modified De Grandy plan imposed by the district court goes far beyond those limits. To create two additional Hispanic majority districts in Dade County, the modified De Grandy plan substantially reconfigures all 31 House districts in South Florida. The remedial plan is not confined to Dade County or the Dade County area, and reshapes districts in areas that were not at issue in this case and for which no evidence of a Section 2 violation was submitted.[76]

The court's remedial order trenches unnecessarily on a host of important state interests. By altering the boundaries of House districts far beyond the area of the alleged Section 2 violation, the remedial plan unnecessarily ignores the important traditional boundary between Dade and Broward counties, and other traditional political divisions that the State Plan sought to preserve.[77] The plan fractures traditional Jewish communities of interest in the Dade County area that the State Plan was careful to preserve.[78] Finally, the plan amounts to a partisan gerrymander that significantly changes the political balance in the State. The modified De Grandy plan imposed by the district court appears consciously designed to minimize Democratic voting strength; the plan pairs 14 Democratic incumbents in newly drawn districts, and could lead to the defeat of as many as 11 Democratic incumbents in the Florida House.[79]

The court's remedial "finding" that the modified De Grandy plan minimized disruption of legitimate state policies is deserving of no weight because it lacks any evidentiary support. That conclusion rested principally on what the court described as the "testimony" of plaintiff De Grandy. J.S. App. 154a. During the remedial proceedings, however, Representative De Grandy did not testify; his statements were unsworn and were not subject to cross-examination. Thus, his "testimony" was not evidence and could not provide a proper foundation for the district court's remedial ruling.

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[76] *See* Affidavit of George H. Meier at 2 (July 2, 1992) (Exhibit 2 to House Defendants' Motion For Reconsideration), J.S. App. 152a-153a. Maps have been lodged with the Clerk of the Court which illustrate the differences between SJR 2-G and the modified De Grandy plan.

[77] *See* Logan Testimony, VII Tr. 81-84, 89-90, 93-94; Wallace Testimony, VII Tr. 165, 166 ("the sentiment on both sides of that county line was to try to respect the integrity of that boundary").

[78] *See* VII Tr. 118-121 (statement by counsel for *amici* with respect to the effect of plaintiffs' proposed remedies on traditional Jewish communities).

[79] Affidavit of Kimball Brace (July 2, 1992) (Exhibit 1 to House Defendants' Motion for Reconsideration), J.S. App. 154a-156a. In contrast, no Hispanic incumbents were paired in the State Plan. Meier Testimony, VI Tr. 215.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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